1923.

KHUB LAL UPADHYA v. JHAPSI KUNDU.

the decree of the District Judge should be restored. The plaintiff in the suit is entitled to his costs of this appeal and of the appeal before Ross, J.

MULLICK, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Jwala Prasad and Foster, J.J.

SUNDER LAL

1923.

November 15.

v.

RAGHUNANDAN PRASAD.*

Hindu Law—Joint family—liability of sons' shares for decree for malicious prosecution.

The shares of the sons in joint family property are not liable in execution of a decree obtained against their father for damages for a tortious act, *e.g.*, malicious prosecution.

Sumar Singh v. *Liladhar*(1), *Beni Ram* v. *Man Singh*(2) *Premsukh Dass* v. *Rambujhawan Mahton*(3) and *Hanumat Mahton* v. *Sonadhari Singh*(4), distinguished.

Deendyal Lal v. *Jugdeep Narain Singh*(5), *Suraj Bunshi Koer* v. *Sheo Pershad Singh*(6), *Banwari Lal* v. *Sheo Sankar Misser*(7), *Thadi Ramamurthi* v. *Moola Kamiah*(8) and *Runwari Lal* v. *Daya Sunker Misser*(9), referred to.

An attachment before judgment does not defeat the right of a co-parcener by survivorship.

Subrao Mangesh Chandwarkar v. *Mahadevi kom Manjibhatta*(10), *Laxman Nilkant Pusalkar* v. *Vinayak Kesho*

*Appeal from Appellate Order No. 35 of 1923, from an order of H. W. Williams, Esq., I.C.S., Additional District Judge of Patna, dated the 13th November, 1922, confirming an order of Lala Damodar Prasad, Subordinate Judge of Patna, dated the 6th December 1921.

(1) (1911) I. L. R. 33 All. 472.
(2) (1912) I. L. R. 34 All. 4.
(3) (1920) 1 Pat. L. T. 34.
(4) (1919) 4 Pat. L. J. 653.
(5) (1873) I. L. R. 3 Cal. 198; L. R. 4 I. A. 247
(6) (1880) I. L. R. 5 Cal. 148; L. R. 6 I. A. 88.
(7) (1909) 1 Ind. Cas. 670.
(8) (1914) 24 Ind. Cas. 667.
(9) (1908-09) 13 Cal. W. N. 815.
(10) (1914) I. L. R. 38 Bom. 106.

Pusalkar(1), *Sahu Ram Chandra* v. *Bhup Singh*(2) and *Raja Bahadur Raja Brij Narain Rai* v. *Mangla Prasad Rai*(3), referred to.

Appeal by the decree-holder.

This was an appeal by an assignee of a decree who sought to execute the same. The decree was obtained by Devakinandan Prasad Singh against Teju Bhagat and Goberdhan Bhagat, father and son, in respect of damages for malicious prosecution. The decree was passed on the 23rd of December, 1919. Teju Bhagat died after the arguments in the case were heard and before the decree was passed. Upon this ground the respondents impugned the decree in the Court below as invalid against Teju Bhagat. This contention was over-ruled.

The execution was levied on 31st May, 1921, against Goberdhan Bhagat, the original judgment-debtor, and his three sons, one of whom died during the pendency of this appeal and in his place Goberdhan Bhagat himself was substituted at the instance of the appellant. The sons of Goberdhan Bhagat objected to the decree being executed against the ancestral property upon the ground that the decree in question was only a personal decree against Teju and Goberdhan and that upon the death of Teju his right passed by survivorship, and that Goberdhan being alive his sons were not liable to pay his debt, and, lastly, that the debt covered by the decree was illegal and for immoral purposes. These contentions prevailed in the Court of the Subordinate Judge, and on appeal by the decree-holder the decision of the Subordinate Judge was upheld by the District Judge.

The circumstances under which the decree was passed were as follows: The decree-holder and his brother Shyam Lal brought a suit on the 8th October, 1912, to recover money against Teju Bhagat and his son Goberdhan Bhagat due on a hand-note, dated the

(1) (1916) I. L. R. 40 Bom. 329.

(2) (1917) I. L. R. 39 All. 437; L. R. 44 I. A. 126.

(3) (1924) 5 Pat. L. T. 1, P. C.

1923.

SUNDER LAL v. RAGHUNANDAN PRASAD.

7th April, 1912, for Rs. 2,000 said to have been borrowed by Goberdhan Bhagat from the decree-holder. The suit was dismissed on 10th March, 1913, it being held that the hand-note was a forged one and that no consideration had passed. The decision of the trial Court was upheld by the District Judge on the 16th July, 1913. The defendants applied for and obtained sanction from the trial Court to prosecute the decree-holder and his brother Shyam Lal and his servant Tukun Lal on charges of forgery, fabricating false evidence as well as for instituting a false suit. The sanction was upheld by the District Judge on 13th December, 1913, and the motion to the High Court against it was rejected on 7th February, 1914. Thereafter the defendant No. 2 filed a petition of complaint before the Magistrate for prosecution of the aforesaid persons, and the accused were committed to the Court of Session. On 17th September, 1914, they were acquitted by the Session Court. The decree-holder Devakinandan then, in 1915, instituted a suit against Teju Bhagat and Goberdhan Bhagat for damages for malicious prosecution in the Court of the Subordinate Judge of Patna. The suit was decreed on 23rd December, 1919. It was held in that case that the hand-note was genuine and was duly executed by Goberdhan and that consideration thereon had passed and that the defendants knew fully that the hand-note was genuine and that they had falsely denied it in the original case for recovery of the money due thereunder and subsequently taking advantage of the dismissal of the suit had falsely and maliciously launched the prosecution against the decree-holder and his brother Shyam Lal and his servant Tukun Lal.

Manohar Lal, for the appellant.

G. P. Das, for the respondents.

JWALA PRASAD, J. (after stating the facts, as set out above, proceeded as follows) :—

The first question raised is as to the nature of this debt. The decree was passed in respect of damages

for malicious prosecution. It was an illegal and immoral act on the part of the defendants to lodge a maliciously false criminal case against the decree-holder. It is also opposed to public policy. The course adopted by the defendants could not possibly be said to be for the benefit of the family and was fraught with great risk to the family status and reputation. It was a highly tortious act. The prosecution was held to be false, and Teju and Goberdhan were liable for criminal prosecution as well as for civil damages, and the damages awarded in the Civil Court were like a fine imposed upon them in a criminal case. A son is bound to pay his father's debt, except the debt incurred for immoral or illegal purposes. *Manu* in Chapter VIII, *sloke* 159, says that a son is not bound to discharge the gambling debt of his father or the unrecoverable balance of a fine imposed upon him, nor to pay off the money due from him for standing surety for another (money recognizance), or a gift made by him to an unworthy person. To the same effect is the view of *Yajnavalkya* in Chapter II, *sloke* 48, wherein he says that a son is not bound to pay the debt even though hereditary if it is contracted for the purpose of drinking, debauchery or gambling, or if it is the residue of a fine or duty unrequited, or anything idly promised. These have been amplified, and the classifications in *Usan* and *Vyas* are as follows:

"Debts due for spirituous liquor, debts due for lust, debts due for gambling, unpaid fines, unpaid tolls, useless gifts or promises without consideration or made under the influence of lust or wrath, suretyship *debts*, commercial debts, debts that are not *Vyavaharika*."

The last word, '*Vyavaharika*', has been rendered by Colebrooke as equivalent to a debt for a cause repugnant to good morals. The debt in question is undoubtedly not *Vyavaharika*. It would also come under the words दण्ड शुल्का वशेषं in *Manu* and *Yajnavalkya*. All such debts mentioned in the *Smrities* when a son is not bound to pay are now comprehended in the words "illegal and immoral." The latter would include in

1923.

SUNDER LAL v. RAGHUNANDAN PRASAD.

itself such debts as are opposed to public policy. In my opinion, the debt in question is illegal and immoral, and to hold it otherwise would be to make a son liable for debts incurred for such tortious and illegal acts of his father

JWALA PRASAD, J.

Mr. *Manohar Lal* contends that the debt in question must come in the category of debts incurred by the father to defend himself in a criminal case or in a suit for defamation, and cites authorities upon the point. The result of judicial decisions, no doubt, has been that a debt incurred by a father to defend himself in a criminal case may in certain circumstances be for the benefit of the family in order to save the father and consequently the family from degradation in the eyes of the public [*Sumer Singh* v. *Liladhar* (1) *Beni Ram* v. *Man Singh* (2), *Premsukh Dass* v. *Rambuihawan Mahton*(3), *Hanumat Mahton* v. *Sonadhari Singh* (4).

The present is not a case where the father incurred the debt to defend himself in an action, civil or criminal, brought against himself. The debt was not incurred to defend himself against the suit for damages for malicious prosecution, but the decree was passed against the defendants in the present case for having done a tortious act, namely, the institution of false and malicious criminal proceedings against the decree-holders. It was a voluntary and aggressive act on the part of the defendants to bring the false criminal case and they were not at that time trying to save themselves against any action, civil or criminal, causing any danger to their person or property. Therefore I agree with the view taken by the learned Subordinate Judge that the debt in the present case was a personal and illegal debt and it was not required for the purpose of the joint family of which the defendants were members.

It is then said that the original suit brought to enforce the debt due under the hand-note was dismissed

(1) (1911) I. L. R. 33 All. 472.
(2) (1912) I. L. R. 34 All. 4.
(3) (1920) 1 Pat. L. T. 34.
(4) (1919) 4 Pat. L. J. 653.

upon the defence taken by the defendants and thereby the family was benefited The present debt has nothing to do with the cost incurred in defending that suit and the argument seems to be much beside the mark.

Then it is said that the debt incurred on the hand-note was for family necessity, namely, for certain marriages in the family as held by the Courts below, and therefore the decree for damages for malicious prosecution must be deemed to be for the benefit of the family. It is hard to understand this argument. The suit for damages was not to enforce the hand-note in question, and in fact the original suit to enforce the hand-note was dismissed. Here the cause of action was based upon the malicious prosecution launched by the defendants.

It is then said that the damages for malicious prosecution have now ripened into a decree and therefore the sons of Goberdhan are not entitled to question the legality of the debt. This view does not find favour with me. The sons were not made parties to the decree, and therefore this is the only stage when they can question the legality of the debt when they have been made parties in the execution proceedings under the new provision contained in section 53 of the Code of Civil Procedure. The decree was not executed in the lifetime of Teju Bhagat. The stage has not arrived to which *Deendyal's* case (1) and *Suraj Bunai's* case (2) can be applied [vide *Banwari Lal* v. *Sheo Sankar Misser* (3), *Thadi Ramamurthi* v. *Moola Kamiah* (4) and *Bunwari Lal* v. *Daya Sunker Misser* (5)].

Mr. *Manohar Lal*, however, says that the defendants' shares must be held liable, inasmuch as there was an attachment before judgment. The Court below has held that there was no proof of any such

(1) (1878) I. L. R. 3 Cal. 198
(2) (1880) I. L. R. 5 Cal. 148.
(3) (1909) 1 Ind. Cas. 670.
(4) (1914) 24 Cal. W. N. 667.
(5) (1908-09) 13 Cal. W. N. 815.

1923.

SUNDER LAL v. RAGHUNANDAN PRASAD.

JWALA PRASAD, J.

attachment. The learned Counsel has shown us the order-sheet of the case. It shows that there was an order for attachment before judgment under Order XXXVIII, rule 5; but the defendants objected to the order and offered to give security for the decree which might have been ultimately passed and the Court directed the attachment to be "recalled." Again, the security was accepted and the Court under rule 6 of Order XXXVIII was bound to order the attachment to be withdrawn. The learned Counsel has not produced the order-sheet of the case at that stage and unless the contrary is shown it must be presumed that the imperative requirement of the law conveyed in the word "shall" was complied with for what is required by the statute must be deemed to have been properly done. Therefore, agreeing with the view of the Court below, I hold that there is no evidence of any attachment before judgment. Teju Bhagat died just after the hearing of the suit and before the judgment and the decree were passed and his interest lapsed into the joint family. Goberdhan and his sons took the entire property by right of survivorship. An attachment before judgment does not rank in the same position as an attachment after judgment. Rule 10 of Order XXXVIII makes it clear, and therefore an attachment before judgment will not defeat the right of a co-parcener by survivorship. There is also authority to this effect: *vide* the cases of *Subrao Mangesh Chandavarkar* v. *Mahadevi kom Manjibhatta* (1) and *Laxman Nilkant Pusalkar* v. *Vinayak Kesho Pusalkar* (2). In the former case, the plaintiff obtained a money decree against a member of a joint family and had attached the family property before judgment. Subsequently the judgment-debtor died while joint with the other members. It was held that the attachment before judgment did not defeat the right of the other members by survivorship. Therefore Teju Bhagat, after his death, ceased to have any interest in the family property, and the decree-holder

(1) (1914) 38 Bom. 105. (2) (1916) 40 Bom. 329.

has no right to proceed in execution of the decree against his interest even if there was an attachment before judgment.

It is then said that two houses out of the properties in question were pledged as security for the satisfaction of the judgment debt during the pendency of the suit and therefore the said properties are liable to be sold as mortgaged properties to satisfy the decree in question. Assuming that the security bond was in the nature of a mortgage there was no antecedent debt to pay off which the bond was executed, nor was the debt for family necessity. The case of *Sahu Ram Chandra* v. *Bhup Singh* (1) has now been considered recently by a Full Board of the Privy Council in the case of *Raja Bahadur Raja Brij Narain Rai* v. *Mangla Prasad Rai* (2), decided on the 14th November, 1923, which lays down that if a father purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind more than his own interest, and an "antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached." The debt in question has already been shown to be immoral and therefore there is no obligation on the sons to pay the same.

Goberdhan has, however, incurred the debts in question and the decree has been passed against him. His share in the family property can be sold in execution of the decree, and the purchaser can enforce the right purchased by partition.

The appeal is therefore dismissed with costs.

FOSTER, J.—I agree.

Appeal dismissed.

(1) (1917) I. L. R. 39 All. 437; L. R. 44 I. A. 126.
(2) (1924) 5 Pat. L. T. 1; P.C.